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August 9, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-3
RM-7874 and RM-7958

Dear Mr. Caton:

Submitted herewith for filing, on behalf of our client, Schuyler H. Martin, permittee of Radio Station KPXA(FM), Sisters, Oregon, are an original and nine (9) copies of his Application For Review in the above-referenced proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By: _____
Irving Gastfreund

Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.203(b)	)	MM Docket No. 92-3
Of The Commission's Rules	)	RM-7874 and
Table of Allotments	)	RM-7958
FM Broadcast Stations	)	
(Prineville and Sisters, Oregon)	)	

To: The Commission

APPLICATION FOR REVIEW

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August 9, 1993

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Summary

The Mass Media Bureau's determinations in its July 8, 1993 Order Denying Motion To Strike are arbitrary, capricious and constitute an abuse of discretion. As shown below, FM broadcast channel allotment proceedings are "rule makings of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules and the Administrative Procedure Act. Importantly, a decision adopted by the Commission 20 days before the date of adoption by the Mass Media Bureau of its Order Denying Motion To Strike makes clear beyond doubt that FM broadcast channel class upgrades on a licensee's own frequency are viewed by the Commission as affecting only the licensee of the station to be upgraded, rather than the world at large, as is suggested in the Bureau's Order Denying Motion To Strike, and that formal notice of proposed rulemaking and comment procedural requirements applicable to rulemakings of general applicability are not applicable where, as here, a licensee or permittee seeks to upgrade an FM station's channel class on the station's authorized channel.

Thus, the action taken by the Bureau in its Order is in conflict with newly articulated Commission policy, with the

Administrative Procedure Act and with Section 1.4(b)(3) of the Commission's Rules. In light of the foregoing, the Bureau's Order Denying Motion To Strike should be expeditiously reversed, and the Petitioners' November 13, 1992 Petition For Reconsideration in this proceeding should be summarily stricken without consideration as untimely. In addition, Martin's November 19, 1992, Petition For Declaratory Ruling should be expeditiously granted.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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FM Broadcast Stations	)	
(Prineville and Sisters, Oregon)	)	

To: The Commission

APPLICATION FOR REVIEW

SCHUYLER H. MARTIN ("Martin"), permittee of Radio Station KPXA(FM), Sisters, Oregon, by his attorneys, pursuant to Section 1.115 of the Commission's Rules, hereby seeks review by the full Commission with respect to the Order Denying Motion To Strike, __ FCC Rcd __, DA 93-776 (Mass Media Bureau released July 8, 1993), issued by the Chief of the Policy and Rules Division of the Mass Media Bureau in this proceeding. In support whereof, it is shown as follows:

I. Introduction

On October 7, 1992, the Allocations Branch of the Mass Media Bureau Policy and Rules Division released its Report and Order in this proceeding, 7 FCC Rcd 6516, DA 92-1276 (Mass Media Bureau released October 7, 1992), in which the Allocations Branch granted Martin's request to substitute Channel 281C1 for Channel 281A at Sisters, Oregon, and to modify Martin's construction permit for Radio Station KPXA(FM) in Sisters to specify operations on Channel 281C1 in Sisters, Oregon. In granting this upgrade of the KPXA(FM) channel class, the Allocations Branch rejected certain contentions made by a group of broadcast licensees serving certain communities in and around Bend, Oregon (hereinafter collectively referred to as the "Petitioners").[1] A summary of the Report and

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[1] Those licensees and their respective stations and communities are the following: Central Oregon Broadcasting, Inc. (licensee of KBND, Bend, Oregon; and KLRR, Redmond, Oregon); Redmond Broadcast Group, Inc. (licensee of KPRB and KSJJ, Redmond, Oregon); Highlakes Broadcasting Company (licensee of KRCO and KIJK-FM, Prineville, Oregon; JJP Broadcasting, Inc. (licensee of KQAK, Bend, Oregon); Oak Broadcasting, Inc. (licensee of

(continued...)

Order was published in the Federal Register on October 14, 1992 -- i.e., one week following the date of the document's release by the Commission. See 57 Fed. Reg. 47006 (October 14, 1992). On November 13, 1992, the Petitioners filed their joint Petition For Reconsideration in which they challenged the determinations made in the Mass Media Bureau's October 7, 1992 Report and Order in this proceeding.

On November 18, 1992, Martin filed his Motion to Strike in this proceeding, in which he demonstrated that the Petitioners' Petition For Reconsideration herein was untimely. Accordingly, Martin requested that the Petition For Reconsideration be summarily stricken without consideration since the Commission has no jurisdiction to consider a late-filed petition for reconsideration, pursuant to Section 405 of the Communications Act. Martin hereby incorporates by reference the entirety of his Motion To Strike.

On November 19, 1992, Martin filed a Petition For Declaratory Ruling with the Commission, seeking a declaratory ruling that the Bureau's October 7, 1992 Report and Order, supra, in this proceeding remains in full force and effect and has not been stayed pursuant to the automatic stay provisions of Section 1.420(f) of the Commission's Rules, in light of the untimeliness of the Petitioners' Petition For Reconsideration in this proceeding. Martin's Petition For Declaratory Ruling is hereby incorporated herein by reference in its entirety.

On July 8, 1993, the Mass Media Bureau released its Order Denying Motion To Strike, supra, in which it denied Martin's Motion To Strike and held that the Petitioners' Petition For Reconsideration was, in fact, timely filed. Accordingly, the Bureau determined, in its Order, that it was unnecessary to

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[1](...continued)
KGRL and KXIQ, Bend, Oregon); Sequoia Communications (licensee of KICE, Bend, Oregon); and The Confederated Tribes of the Warm Springs Reservation of Oregon (licensee of KTWS, Bend, Oregon; and KTWI, Warm Springs, Oregon.

address Martin's Petition For Declaratory Ruling since that Petition was premised on the assumption that the Petitioners' Petition For Reconsideration was untimely filed.

In reaching the determination that the Petitioners' Petition For Reconsideration was timely filed, the Bureau expressly rejected Martin's arguments that FM broadcast channel allotment proceedings, such as this one, constitute "rule makings of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules. In his Motion To Strike and in his November 25, 1992 Reply To Opposition To Motion To Strike (which is incorporated herein by reference), Martin had demonstrated that, since Section 1.4(b)(3) of the Commission's Rules controls the deadline for filing requests for reconsideration in this proceeding, the Petitioners' Petition For Reconsideration was untimely filed under Section 1.4(b)(3) of the Commission's Rules, since the Petition For Reconsideration was filed with the Commission later than 30 days following the date of release of the Report and Order, supra. The Mass Media Bureau held as follows:

> "Rulemakings of particular applicability under the Administrative Procedure Act and our computation of time rules are those rulemaking proceedings addressed to named persons. In such proceedings, there is no requirement to publish either the proposed or final rule in the Federal Register, and personal service on the particular parties subject to the rule is sufficient. See 5 U.S.C. 552(a)(1)(D); 553(b); ABC v. FCC, 682 F.2d 24, 31-32 (2d Cir. 1982); .... [Further citations omitted]. Thus, Section 1.4(b)(3) was intended to address potential confusion that might arise concerning the date of public notice in such proceedings because, although classified as a rulemaking, the Commission in such proceedings may dispense entirely with Federal Register publication. See 47 C.F.R. 1.4(b)(3). ... broadcast allotment proceedings do not fall within this category. They are not rules that apply to named persons. Indeed, it would be impossible to determine in advance all the stations or persons potentially affected by a broadcast allotment proceeding and to serve such parties personally with the proposed or final rule. [Footnote omitted.] ... We therefore conclude that, for purposes of the Administrative Procedure Act and hence for our computation of time rules, broadcast allotment proceedings are rulemakings of general applicability. The petition for reconsideration filed by the ... [Petitioners] ... was thus timely filed under 47 C.F.R. 1.4(b)(1) [of the Commission's rules]."
>
> Order Denying Motion To Strike, slip op. at 2, ¶¶8-9.

For the reasons set forth below, the Bureau's above-cited conclusions are arbitrary, capricious, and constitute an abuse of discretion. As shown below, FM broadcast channel allotment proceedings are "rule makings of particular applicability", within the meaning of Section 1.4(b)(3) of the

Commission's Rules and the Administrative Procedure Act. There is no precedent supporting the Bureau's conclusion that "rule makings of particular applicability" under Section 1.4(b)(3) and the Administrative Procedure Act are only "those rule making proceedings addressed to named persons", nor does the Bureau cite to any such precedent. Most importantly, a decision adopted by the Commission 20 days before the date of adoption by the Bureau of its Order Denying Motion To Strike makes clear beyond doubt that FM broadcast channel class upgrades on a station's own frequency are viewed by the Commission as affecting only the licensee of the station to be upgraded, rather than the world at large, as is suggested in the Bureau's Order Denying Motion To Strike, and that formal notice of proposed rulemaking and comment procedural requirements applicable to rulemakings of general applicability are not applicable where, as here, a permittee seeks to upgrade an FM station's channel class on the station's authorized channel.

Thus, the action taken by the Bureau in its Order is in conflict with newly articulated Commission policy, with the Administrative Procedure Act and with Section 1.4(b)(3) of the Commission's Rules. In light of the foregoing, the Bureau's Order Denying Motion To Strike should be expeditiously reversed, and the Petitioners' November 13, 1992 Petition For Reconsideration in this proceeding should be summarily stricken without consideration as untimely. In addition, Martin's November 19, 1992, Petition For Declaratory Ruling should be expeditiously granted.

II. Questions Presented For Review

1. Whether the Mass Media Bureau erred in its determination that FM channel upgrade proceedings are "rulemakings of general applicability" rather than "rulemakings of particular applicability" within the meaning of Section 1.4(b)(3) of the Commission's Rules and the Administrative Procedure Act?

2. Whether the Mass Media Bureau erred in its determination that the term "rulemakings of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules and the Administrative Procedure Act, refers only to those rulemaking proceedings which are "addressed to named persons"?

3. Whether the Mass Media Bureau erred in failing to grant Martin's November 18, 1992 Motion To Strike and in failing to summarily dismiss as untimely the

Petitioners' November 13, 1992 Petition For Reconsideration in this proceeding?

4. Whether the Mass Media Bureau erred in holding that it was unnecessary to address the merits of Martin's November 19, 1992 Petition For Declaratory Ruling?

III. Argument

The Mass Media Bureau was simply wrong as a matter of law in its determination that this proceeding is not a "rule making of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules. The Commission adopted Section 1.4(b)(3) of the Rules in Amendment Of The Rules Regarding Computation Of Time, 2 FCC Rcd 7402 (released December 15, 1987). The Commission therein stated as follows with respect to the purpose of the new Section 1.4(b)(3):

> "[W]e have added a new subsection 1.4(b)(3) which clarifies the date of public notice for rule makings of particular applicability. For further information about the applicability of this subsection, see Declaratory Ruling, 51 Fed. Reg. 23059 (June 25, 1986)."
>
> 2 FCC Rcd at 7402.

In the Declaratory Ruling, supra (a reference to which is incorporated in the express language of Section 1.4(b)(3)), __ FCC 2d __, 60 RR 2d 524 (1986), the Commission stated, in pertinent part, as follows:

> "Rules of particular applicability ... are adopted after notice and comment procedures but are not required to be published in the Federal Register. See 5 U.S.C. §552(a)(1)(D): American Broadcasting Companies, Inc. v. FCC, 682 F.2d 25, 31 (2d Cir. 1982). The Commission may decide, however, that Federal Register publication is desirable in some instances ... [Q]uestions have arisen whether rule making decisions which adopt rules of particular applicability are controlled by §1.4(b)(1) [in which public notice is triggered by the date of publication in the Federal Register] or by §1.4(b)(2) [in which public notice is triggered by the release date of the decision]. In the future, the Commission will indicate in its decisions if a rule of particular applicability (or a summary thereof) is to be published in the Federal Register. Where the decisions specify Federal Register publication, the Federal Registration publication date will trigger the date upon which public notice is given (i.e., the procedure will be identical to that set forth in §1.4(b)(1)). In all other cases, §1.4(b)(2) will govern, even if the Commission subsequently decides upon Federal Register publication. This will permit interested parties to determine, upon release of the decision, whether the date of public notice is to be triggered by the release date or by the date of Federal Register publication. ... In the future, ... rules of particular applicability will be governed by §1.4(b)(1) only when the decisional document itself specifies Federal Register publication. This will prevent any unnecessary uncertainty."

51 Fed. Reg. at 23060, 60 RR 2d at 525.

In its Order herein, the Bureau purports to rely on American Broadcasting Companies, Inc. v. FCC, 682 F.2d 25 (2d Cir. 1982) -- a decision cited by the Commission in its Declaratory Ruling, supra. In point of fact, the Court's decision in American Broadcasting Companies, Inc. v. FCC supports Martin's position in this case. The Court in American Broadcasting Companies, Inc. held as follows:

> "The APA [i.e., the Administrative Procedure Act] distinguishes between rules of 'general applicability' and rules of 'particular applicability'. See 5 U.S.C. § 551(4). Under the APA, 'substantive rules of general applicability' are required to be published in the Federal Register. 5 U.S.C. § 552(a)(1)(D). Further, Section 553(d) provides in pertinent part that '[t]he required publication ... of a substantive rule shall be made not less than 30 days before its effective date.' The APA, however, makes no provision for publication of rules of particular applicability.
>
> "The legislative history of the APA confirms that decisions in agency ratemaking proceedings such as the establishment of a utility's allowable rate of return are rules of particular applicability and as such are free from the publication requirement. Section 3(a)(3) of the APA, the predecessor of Section 552, 5 U.S.C. § 1022(a)(3) (1964), required every agency to publish in the Federal Register 'substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law.' Thus, as recognized in the Attorney General's Manual on the Administrative Procedure Act at 22 (1947), Section 3(a)(3) was not intended to apply to 'particularized rulemaking' such as ratemaking:
>
> > "This exemption for 'rules addressed to and served upon named persons in accordance with law' is designed to avoid filling the Federal Register with a great mass of particularized rule making, such as schedules of rates, which have always been satisfactorily handled without general publication in the Federal Register.
> >
> > "The phrase 'substantive rules adopted as authorized by law' refers, of course, to rules issued by an agency to implement statutory policy. Examples are the Federal Power Commission's rules prescribing uniform systems of accounts and proxy rules issued by the Securities and Exchange Commission.
>
> "This section of the APA was subsequently amended to its present form as part of the Freedom of Information Act. Pub.L. No. 89-487, 80 Stat. 250 (1966). The proviso 'but not rules addressed to and served upon named persons' was deleted from the statute. However, the legislative history indicates that the amendment was intended merely to clarify, rather than change, which rules were required to be published in the Federal Register. United States Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act

10 (1967); H.R. Rep. No. 813, 89th Cong., 1st Sess. 6 (1965). The Senate committee that formulated Section 552 of the APA stated:

> "In Section 2 of the Administrative Procedure Act, rules are defined in such a way that there is no distinction between those of particular applicability (such as rates) and those of general applicability. It is believed that only rules, statements of policy, and interpretations of general applicability should be published in the Federal Register; those of particular applicability [are] legion in number and have no place in the Federal Register and are presently excepted but by more cumbersome language.

"S. Rep. No. 1219, 88th Cong., 2d Sess. 4 (1964) (emphasis added). See also Note, The Judicial Role in Defining Procedural Requirements for Agency Rulemaking, 87 Harv. L. Rev. 782, 788-89 (1974).

"Thus, ratesetting, including the setting of a rate of return percentage, is a rule of particular applicability. Such a pronouncement, although it impacts upon the public, does not 'so directly affect[] pre-existing legal rights or obligations', Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977), as to require publication in the Federal Register. [Footnote omitted, emphasis in original.]"
682 F.2d at 31-32.

Thus, the Court in American Broadcasting Companies, Inc. v. FCC made clear that the term "rule makings of particular applicability" encompasses far more than merely proceedings to establish a common carrier's rate of return or its schedule of tariffed rates, and, therefore, there is no merit to any suggestion to the contrary, nor to the Mass Media Bureau's unsupported conclusion that "rule makings of particular applicability" "... are those rulemaking proceedings addressed to named persons". Order at ¶8. Indeed, the Court of Appeals made clear that the term "rulemakings of particular applicability" applies to the multitude of notice and comment rulemaking proceedings which, although arguably impacting on the public, do not so directly affect preexisting legal rights or obligations as to require Federal Register publication.

Unquestionably, the instant channel allotment rulemaking proceeding is a "rule making of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules. The Mass Media Bureau's October 7, 1992 Report and Order in this proceeding substituted Channel 281C1 in lieu of Channel 281A at Sisters, Oregon, and modified Martin's construction permit for Radio Station KPXA(FM) to specify operations on the higher class channel -- i.e., on the very same channel

(Channel 281) on which the station had already been authorized. The Mass Media Bureau's Report and Order in this proceeding did not allot any new channels which would be made available for applications by interested members of the public. Under these circumstances there is no rational basis for concluding that this channel allotment rulemaking proceeding/license modification proceeding is anything other than a "rule making of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules.

In this latter connection, it should be noted that the Commission has held as follows with respect to channel allotment rulemaking proceedings:

> "Sections 73.202(b), 73.504 and 73.606(b) of the Commission's rules contain the FM and TV tables of assignments. ... However, the tables were not designed to be saturated. That is, new communities and/or channels could be added from time to time as needed. Because the tables themselves are part of the Commission's rules, rule making is required to amend the relevant table by the addition of a new community with its assigned channel or the addition of a new channel to a community already on the table but without an unoccupied channel. Approximately 150 new requests to amend the tables are filed each year. Generally, once it has been established that the proposed station location is a community and the proposed channel meets all the Commission's minimum mileage separation requirements, the request is granted. Rarely is there any interest in the matter beyond the directly affected parties. As is apparent from the foregoing, the process by which the Commission routinely amends the tables maintains the same procedural safeguards as other rule makings, but these individual cases are concerned only with a very limited number of communities and/or parties. In fact, in most cases, only one community and party is involved. It therefore appears that rule making proceedings involving amendments to the tables do not involve substantial impact on a significant number of entities. [Emphasis added.]"
>
> Certification That Sections 603 And 604 Of The Regulatory Flexibility Act Do Not Apply To Rule Making To Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 84 FCC 2d 791, 792 (1981).

Thus, the Commission itself has expressly recognized that channel allotment rulemaking proceedings are "rule makings of particular applicability". Indeed, it is difficult to imagine any proceeding that would better qualify as a "rule making of particular applicability" than would a channel allotment rulemaking proceeding/license modification proceeding, particularly where, as here, the proceeding did

not result in allotment of any new channels which would be made available for applications by interested members of the public.[2]

It should be noted, in this regard, that, in the instant FM channel allotment proceeding, all that was involved was a channel upgrade for Radio Station KPXA(FM) from Channel 281A to Channel 281C1 in Sisters, Oregon. See Report and Order, 7 FCC Rcd 6516 (Mass Media Bureau 1992). Under Section 1.420(g)(3) of the Commission's Rules, no one may file a competing expression of interest in an FM permittee's or licensee's request for a channel upgrade for the same FM channel (or any first, second or third adjacent channel).

The fact that the allotment of an upgraded channel might have some preclusive effect on other broadcast technical facilities or that some member of the public might seek to file a pleading in opposition to a proposed allotment, is not sufficient to convert a channel allotment rulemaking proceeding into a rulemaking of general applicability. In point of fact, the same rationale used by the Mass Media Bureau to attempt to justify its denial of Martin's Motion To Strike could very well apply to any application filed by a broadcast licensee seeking a modification of technical facilities. Yet, no one would seriously argue that application proceedings are rulemakings of general applicability. Moreover, the same rationale relied upon by the Bureau could well be raised in support of the proposition that common carrier rate of return and tariff proceedings are "rule makings of general applicability". Indeed, it is manifest that the public at large is more dramatically impacted by overall increases in a common carrier's rate of return and increases in a common carrier's tariffed rates than by

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[2] The Court of Appeals has recognized that channel allotment rulemaking proceedings involve "resolution of conflicting private claims to a valuable privilege". Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959). This holding bolsters the conclusion that channel allotment rulemaking proceedings/license modification proceedings are "rule makings of particular applicability", particularly where, as here, the Commission merely upgrades an existing licensee's or permittee's channel and does not allot any new channels for applications.

any channel upgrade allotment rulemaking proceeding. Yet, even the Petitioners in this case concede, as they must under applicable precedent, that common carrier rate of return rulemaking proceedings and tariff proceedings are one type of "rule making of particular applicability". See Opposition To Motion To Strike at 3. What the Bureau appears unwilling to recognize is the fact that common carrier rate of return proceedings and tariff proceedings are not the only types of "rule making of particular applicability". Indeed, as noted above, Congress has recognized that rulemakings "... of particular applicability [are] legion in a number and have no place in the Federal Register..." S. Rep. No. 1219, 88th Cong., 2d Sess. 4 (1964), cited approvingly in American Broadcasting Companies, Inc. v. FCC, supra, 682 F.2d at 32.

While some channel allotment rulemaking proceedings are subject to notice and comment procedural requirements (subject to the very recent changes in Commission policy discussed more fully below), there is no merit to the suggestion that channel allotment rulemaking proceedings are designed to adopt the substantive rules of general applicability. In order to constitute a "substantive rule ... of general applicability" which is required to be published in the Federal Register pursuant to 5 U.S.C. § 552(a)(1)(D), the substantive rule must "... so directly affect pre-existing legal rights or obligations ... [or be] ... of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence..." Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977). See also Lewis v. Weinberger, 415 F.Supp. 652 (D.N.Mex. 1976); United States v. Hayes, 325 F.2d 307, 309 (4th Cir. 1963). Plainly, the results of FM channel allotment rulemaking proceedings/license modification proceedings do not meet these standards. Stated otherwise, such proceedings do not result in the formulation of substantive rules that must be used by members of the public "... as a guide in the conduct in their day-to-day affairs". United States v. Hayes, supra, 325 F.2d at 309.

In any event, very recent changes in Commission policy make it clear, that the Commission views same-channel FM channel upgrades, such as the one at issue in this proceeding, as affecting only the particular licensee or permittee of the station in question, rather than the public at large. In Amendment Of The Commission's Rules To Permit FM Channel And Class Modifications By Application (MM Docket No. 92-159), __ FCC Rcd __, FCC 93-299 (adopted June 4, 1993 and released July 13, 1993), the Commission amended Sections 1.420, 73.203 and 73.3573 of its Rules to permit licensees and permittees of FM broadcast stations to request, by means of application, rather than by rulemaking proceedings, upgrades in FM channel class on the same FM channel and on co-channels and on adjacent channels which are within three channels above and three channels below the specified channel. The Commission's change was intended to eliminate the pre-existing two-step process in which the licensee or permittee first must file a petition for rulemaking and, if the petition is granted, the party must thereupon file an FCC Form 301 minor modification application. Thus, the Commission allowed parties, such as Martin, to seek same-channel FM channel class upgrades through the filing of a minor modification construction permit application.

In providing for such a one-step process to FM channel class upgrades on the same channel, or on adjacent channels, the Commission stated as follows:

> "As we stated in the Notice, grant of the [minor modification] application will be followed by an amendment to the FM Table of Allotments. Such amendments will be treated as minor and non-controversial as they simply reflect authorized station operations. Thus, there is good cause for proceeding without notice and comment and for making the rule change effective upon publication in the Federal Register. See 5 U.S.C. Section 553(b)(B)(d). [Emphasis added.]"
>
> Amendment of the Commission's Rules To Permit FM Channel and Class Modification by Application, supra, slip op. at 3 n.18.[3]

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[3] It should be particularly noted that, under Section 73.3584(a) of the Commission's Rules, interested parties have no right to file any petition to deny against a minor modification application, such as same-channel channel class upgrade applications under Section 73.3573 of the Commission's Rules.

In short, the Commission itself has now recognized, under its revised rules and policies, that same-channel upgrades in channel class for FM stations affect only the particular station in question, and not the public at large, as long as the Commission's channel allotment standards are complied with, and that the formal notice and comment procedural requirements applicable to rulemakings of general applicability are not required in connection with such channel class upgrade proceedings. See Note 1 to Section 73.3573 of the Commission's Rules and Note to Section 73.203 of the Commission's Rules.

These very recent changes in rules and policy by the full Commission make it evident that the underlying premise for the Bureau's Order Denying Motion To Strike was wrong. Specifically, the Bureau erred in its determination that channel allotment rulemaking proceedings must be published in the Federal Register, and that they are not matters of "particular applicability". It was totally arbitrary, capricious and an abuse of discretion for the Commission to conclude, in its Order, as follows:

> "Federal Register publication of both the Notice Of Proposed Rulemaking and the Report and Order in broadcast allotment proceedings is thus required under Sections 552(a)(1)(D) and 553(b) of the Administrative Procedure Act, and that is our consistent practice. [Emphasis added.]"
>
> Order Denying Motion To Strike, supra, slip op. at 2, ¶9.

It is impossible to fathom how the Bureau could rationally have reached these conclusions when it adopted its Order To Deny Motion To Strike on June 24, 1993, or when it released that document on July 8, 1993, in light of the fact that, on June 4, 1993, the full Commission adopted its Report and Order in MM Docket No. 92-159 in Amendment of the Commission's Rules To Permit FM Channel and Class Modifications By Application, supra, in which the Commission expressly stated that same-channel upgrades in channel class for FM stations will be treated as "minor and non-controversial as they simply reflect authorized station operations...", and that, therefore, "there is good cause for proceeding without notice and comment and for making the rule change effective upon publication in the Federal Register. [Emphasis added.]" Id., slip op. at 3 n. 18. The Bureau certainly must have known at the time that it adopted and subsequently released its Order Denying Motion To Strike that, on June 4, 1993, the Commission had effected the foregoing changes in policy in MM Docket No. 92-

159. Indeed, the Commission issued a Public Notice describing its new one-step, minor modification procedures for same-channel upgrades in FM channel class, as adopted in MM Docket No. 92-159, and that Public Notice (Report No. DC-2457) was released to the public at large on July 7, 1993 -- i.e., one day prior to the date of release by the Mass Media Bureau of its July 8, 1993 Order Denying Motion To Strike in this proceeding. In light of all the foregoing, the Bureau's determinations and actions in that Order are arbitrary, capricious and an abuse of discretion, and contrary to Commission policy and rules.

In light of all the foregoing, its beyond question that the instant FM channel allotment proceeding cannot rationally be viewed as a rulemaking of general applicability, but, rather, must be considered a "rulemaking of particular applicability", which is governed by Section 1.4(b)(3) of the Commission's Rules. Accordingly, for the reasons set forth in Martin's November 18, 1992 Motion To Strike, and in his November 25, 1992 Reply To Opposition to Motion To Strike, the Petitioners' November 13, 1992 Petition For Reconsideration in this proceeding was untimely filed, since it was filed after the expiration of the 30-day period following the date of release (i.e., October 7, 1992) of the Mass Media Bureau's Report and Order in this proceeding, 7 FCC Rcd 6516.

IV. Conclusion

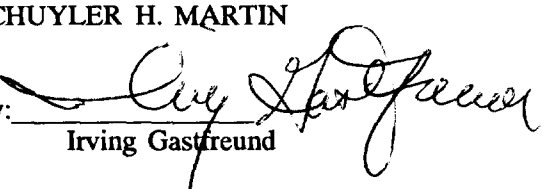
Notwithstanding the Bureau's determinations to the contrary in its Order, the mandate of Section 1.4(b)(3) of the Commission's Rules is clear and unmistakable. An administrative agency is under an obligation to follow its own rules and procedures. See American Federation Of Government Employees v. Federal Labor Relations Authority, 777 F.2d 751, 759 (D.C. Cir. 1985); National Conservative Political Action Committee v. Federal Election Commission, 626 F.2d 953, 959 (D.C. Cir. 1980; see, also, United States v. Nixon, 418 U.S. 683, 694-96 (1974); Lucas v. Hodgess, 730 F.2d 1493, 1504 n. 20 (D.C. Cir. 1984). See, generally, 2 K.Davis, Administrative Law Treatise, § 7:21 at 98-99 (1979). The Commission must, therefore, enforce Section 1.4(b)(3) in accordance with

its terms and must therefore dismiss the Petitioners' Petition For Reconsideration without consideration as late-filed.

WHEREFORE, the foregoing premises considered, it is respectfully requested that the Commission enforce Section 1.4(b)(3) of its Rules in accordance with its terms by reversing the Bureau's Order Denying Motion To Strike, by summarily dismissing the Petitioners' November 13, 1992 Petition For Reconsideration without consideration as late-filed, and by expeditiously granting Martin's November 19, 1992 Petition For Declaratory Ruling.[4]

Respectfully submitted,

SCHUYLER H. MARTIN

By: 
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August 10, 1993

[4] Since, as shown above, the Petitioners' Petition For Reconsideration was untimely filed, the Bureau erred in its determination that it was unnecessary to address the merits of Martin's Petition For Declaratory Ruling. By granting Martin's Petition For Declaratory Ruling, the Commission will be formally declaring that there is no stay applicable to the Mass Media Bureau's channel allotment Report and Order in this proceeding. Such action will expedite the prompt the initiation of upgraded service by Martin, as contemplated by the Report and Order.

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that I have on this 9th day of August, 1993, sent copies of the foregoing "Application For Review" by First-Class U.S. Mail, postage prepaid, or via hand-delivery, as indicated below, to the following:

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